

**IN THE MATTER OF:**

) **DUE PROCESS HEARING**

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**G.R.**

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**NO. 05-39**

**SUMMARY**

This case involves a student who was age 15 and in the 9<sup>th</sup> grade at the time of the hearing. The child/student began receiving special education and/or related services at age 3. The school system requested the Due Process Hearing and the issue is whether, in the factual situation present in this case, the school system legally has the right to perform a reevaluation of the student regarding cognitive performance and capability after the parent denied the request for permission to conduct such testing.

A school system is to conduct a reevaluation at least every 3 years and to conduct a reevaluation, if conditions warrant, to determine whether the student continues to be eligible for special education and related services, unless the parents and the local education agency agree that reevaluation is unnecessary. However, reevaluation is not to be conducted more frequently than once a year unless the parents and school system agree otherwise. The school system submitted a Reevaluation Team Recommendation Parental Consent form to the parents stating that on February 15, 2005, the Reevaluation Team reviewed the existing data and determined that more information was needed in seven specified areas and requested the parent to indicate whether the parent agreed or not. The mother signed the document on March 22, 2005 and indicated agreement with five of the specified areas and disagreement with the areas of "Cognitive Functioning" and "Adaptive Behavior" and handwrote a response on the document which included the statement to the effect that the school system could not proceed without consent unless and until it obtained a Due Process Hearing Order. Following the parental denial of complete consent, the School system sent notices/invitations to the parents for the May 6 and May 13, 2005 IEP Team meetings to review reevaluation results and determine eligibility for special education and related services, and to review or develop an IEP. In May 2005, the IEP team had meetings for reevaluation and development of IEP and recertified

**BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION  
DIVISION OF SPECIAL EDUCATION**

**IN THE MATTER OF:**

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**NO. 05-39**

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**FINAL ORDER**

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Jack E. Seaman (4058)  
Administrative Law Judge  
2021 Richard Jones Road  
Suite 350  
Nashville, Tennessee 37215-2874  
615/383-3332

## **FINAL ORDER**

This proceeding arises pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA). A stated purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The instant case involves a student who was age 15 and in the 9<sup>th</sup> grade at the time of the hearing. In July 2005 the school system submitted a request for Due Process Hearing stating that the "School System believes it necessary to perform a re-evaluation of the student regarding cognitive performance and capability but parents refuse to grant permission for cognitive testing" and the school system requested to be permitted "to perform cognitive testing." At the first conference call the parents requested continuance to obtain counsel and the school system's counsel had filed a motion for extension of the 45 day rule. After counsel was obtained and a conference call was conducted, both counsel agreed to waiver of the 45 day rule and the hearing was set to begin on August 30, 2005. Thereafter, counsel for the school system filed a Motion for Summary Judgment and counsel for the student/parents filed a Motion to Dismiss, both of which were presented at a preliminary hearing September 27 after the due process hearing was continued from the original setting. The Motion for Summary Judgment contended that there were no genuine issues of material fact and that as a matter of law the school system was entitled to summary judgment. The Response on behalf of the student/parents disagreed and submitted that there were numerous material facts in dispute and that under the law the school system was not entitled to summary judgment. The Motion to Dismiss asserted that there were no justiciable issues presented in the Request for Due Process Hearing because the May 2005 IEP Team meeting records showed that there had been re-evaluation, the student had been determined eligible for special education benefits and services, an IEP for 2005-2006 had been developed and agreed to by all participants, and no other options had been considered. School system's Response to the Motion to Dismiss asserted that because the parents had

refused to consent to evaluation of cognitive ability and the school system had determined the student continued to be eligible for special education as hearing impaired and developed an IEP did not deny the school system the right to “determine whether the student has another disability besides hearing impairment and develop an IEP from the information sought to develop an IEP that better enables the student to prosper.” Based on the pleadings and the hearing on the motions it appeared that a Due Process evidentiary hearing would be necessary because there were several questions as to factual and legal issues which required a hearing for determination.

Thereafter, counsel for all parties agreed to several continuances of the hearing date and waivers of the 45 day rule and the Due Process Hearing began April 12, 2006.

### ISSUES

The primary issue identified prior to the hearing was as follows:

1. Whether in the factual situation present in this case the school system legally has the right to perform a reevaluation of the student regarding cognitive performance and capability after the parent denies the request for permission to conduct such testing and, also, whether refusal of the request for testing raised an issue as to whether the student was entitled to continue in special education.

### POSITION OF THE PARTIES

The school system contends that because the parents refused the school system’s request to conduct a reevaluation of the student’s cognitive ability that the school system should be permitted to conduct the evaluation without the parents’ consent or, alternatively, that the school system should be relieved from providing the student special education and related services.

The parents maintain that re-evaluation must be for determination of continued eligibility for special education and related services and to develop an IEP and because a reevaluation had been conducted and determination of eligibility and development of an IEP had been completed that there was no legal basis for the requested reevaluation.

### THE DUE PROCESS HEARING

Several witnesses and exhibits were presented at the due process hearing and all have been considered. There were several exhibits that were objected to and were only admitted for identification and subsequent determination of admissibility. Because all exhibits had to be considered at least for determination of admissibility, were addressed during hearing testimony, and because none of the objected-to exhibits are controlling on the outcome of this proceeding, all exhibits are accepted as admissible. Because there is essentially no factual dispute in this proceeding, a summary of portions of the evidence provides the factual basis for this final order.

### EVIDENCE

The student's mother was the first person called as a witness by the school system. Sometime in the summer of 2004 someone at the school system mentioned to the then parent's counsel that they thought they should evaluate the student for cognitive ability. Later in the summer of 2004 there was a negotiation session between the parents, counsel, and school system in a previous due process hearing request that did not involve the issue in this proceeding; however, the issue was discussed but not resolved. A Parent/Guardian Information for Reevaluation form, dated January 27, 2005, indicated that the last school system

psychological or educational evaluation of the student was conducted during the fall of 1998. The last evaluation for cognitive ability was privately performed in relation to a cochlear implant at a later date and was not provided to the school system. There has not been a cognitive evaluation since the cochlear implant. The student has different disabilities and the primary one used for certification regarding special education has been hearing impairment. He also has Down Syndrome.

In February 2005, the school system stated that it thought it needed to evaluate the student for cognitive ability and prior to the May 2005 IEP meetings Parents refused permission to do cognitive evaluation. In May 2005, the IEP team had meetings and reported that reevaluation results were shared, eligibility determination for hearing impairment was reestablished, an IEP was developed for 2005-2006 school year, and all participants in the IEP team agreed to all determinations and the IEP.

The student is reported as making academic progress as a special ed student and the parents do not agree with the school system statement that the cognitive testing the school seeks would help the school enable the student make more progress. The parents believe that the IEPs that the IEP team has developed and agreed were appropriate and the progress the IEP team reports show that the student has been making is all appropriate.

Upon cross examination by the parents' and student's counsel, it was explained that the student is in the ninth grade and has been receiving special education services since about age 3. The student has gone through multiple testing each year and was given a cognitive evaluation in 1998. His IEP developed each year has never been limited to services related to student's hearing impairment. The mother testified that she knew every 3 years there would be a determination of eligibility for special education for her son and that on May 6, 2005 the IEP team all agreed and signed the Eligibility Report form determining that the student was eligible for special education.

On redirect exam by the school attorney, the mother testified that since the May 2005 IEP meetings when the student was determined eligible for special education and the 2005-2006 IEP was developed and agreed to by all

participants, the parents had not been asked to permit cognitive testing except by the filing of the request for due process hearing.

The school then called the father as second witness. He testified that he agreed with the testimony of his wife in general and that at the IEP meeting in May 2005 when the student was requalified for special education and the IEP for school year 2005-2006 was developed there was no discussion or request regarding a cognitive evaluation of the student.

The next witness was the Special Education Supervisor of the school system who had worked in that position since April 1996 and had been with the school system for a total of 29 years. She was designated as an expert in special education and special education supervision based on prior training/education and experience. She had worked with this student since April 1996 when she began attending IEP meetings. She agreed with the previous testimony that the student was making progress.

She testified that she felt that the school system needed information regarding the student's cognitive ability because he had received a cochlear implant, because he was now older they needed to develop a transition IEP and a TCAP-Alt assessment, and because they could develop a more meaningful and purposeful IEP if they had more information about the student. On cross-examination she admitted that there was no discussion of cognitive testing at the two IEP meetings in May 2005 when the IEP for 2005-2006 was developed. There had been reevaluation for the 2005 IEP team meeting and the results were discussed, continued eligibility for special education was determined, and the IEP that was developed contained goals to meet the student's needs because of hearing impairment and other areas that reevaluation showed needs for. The transition IEP and the TCAP-alt assessment determination had been completed during the May 2005 IEP team meetings.

Although reevaluation of the student determined he continued to be eligible for special education because of hearing impairment, the IEP contained

numerous goals and many had nothing to do with hearing impairment and addressed needs in other areas identified by the IEP team. There was no discussion of cognitive testing being needed at the IEP team meetings determining reevaluation and developing the IEP for 2005-2006. May 6, 2005 was the reevaluation meeting date and May 13, 2005 was the finalization of the IEP.

The witness's position is that she believes the student has disabilities other than hearing impairment and that cognitive testing is needed to determine any other disability even though many of the IEP goals and services provided the student are not related to hearing impairment. It was agreed that there has been much testing of the student regarding achievement, occupational therapy, speech, and other areas and that records showed his weaknesses, strengths, and areas of needs and had been used to develop IEPs. She testified that she feels that this student does need special education services and that the requested testing can help plan what is appropriate for the student.

The school system does not have any I.Q. level record for this student. Although there was testimony that there had been cognitive testing performed in 1998, this witness testified that no I.Q score had been determined because of the student's age and the activities involved in the testing of the student.

This witness indicated that she thought the parents wanted the student to remain in general academics and receive a regular diploma; however, although the witness testified that she thinks all children should be given that opportunity, she feels that cognitive testing could result in a more meaningful and purposeful IEP with different goals and objectives and the student not spending most of the school day involved in academics regarding math, reading, and writing.

The next witness presented by the school system serves as special education coordinator and coordinator of homebound services for the school system. She had worked with the school system for about 24 years and served as school psychologist for about the first 16 years. She was agreed to be an expert in school psychology. She thought cognitive testing and determination of



mental retardation could be beneficial to the student because they could determine if he was achieving to his ability level or not. If so, the IEP would remain the same; however, if his ability level was higher than recorded achievement reflected, the school could develop a different IEP. She believed that the IEP team, which she did participate in, did a good job developing the 2005-2006 IEP and that it was appropriate for the student; but, the IEP team possibly could have done better if it had more information. She knew that the student has been receiving services since he was three years old relating to issues other than hearing impairment, including IEPs that have been developed, and he has been reevaluated and recertified for special education services every three years since being in school.

There was discussion and request by the school system for cognitive testing in or around February 2005 and the request was denied by the parents. Thereafter, in May 2005, the IEP team had meetings for reevaluation and development of IEP and recertified the student as eligible for special education as hearing impaired and developed an IEP which addressed issues and needs of the student, including many not related to hearing impairment. At the May 2005 reevaluation and IEP team meetings there was no mention of cognitive testing and all members of the IEP team agreed that the IEP best met the student's needs at that time.

The May 6, 2005 reevaluation and development of IEP includes the provision that the next reevaluation for eligibility for special education is scheduled for May 6, 2008 and the school system witness says that is for reevaluation of hearing impairment even though he is getting services unrelated to hearing impairment. However, the witness testified that rather than waiting until 2008 they could do reevaluation including cognitive ability testing to determine another disability and improve the student's access to education.

The next witness was a person with hearing impairment who had been employed by the school system as a deaf-education teacher since October 2004 and had previously taught for approximately 15 years. She had worked with this

student as a student with Down Syndrome that was also hearing impaired; however, she was not working with him during the year of the hearing. She thought it might be beneficial to know the student's cognitive abilities; however, she had not seen his progress reports or did not remember what she had seen regarding the progress of this student. She had been on the IEP Team and involved to some degree in development of the 200-2006 IEP.

The parents/student did not present any additional witnesses because counsel stated that the school system had called all the student's witnesses.

### DISCUSSION

Children with disabilities must be reevaluated at least once every three years to determine whether they continue to be eligible for special education and related services, unless the parents and the local education agency agree that reevaluation is unnecessary. However, reevaluation is not to be conducted more frequently than once a year unless the parents and school system agree otherwise. 20 U.S.C. §1414 provides for reevaluations and provides the information that the IEP team is to consider. The evidence presented in this hearing clearly shows that the student has been reevaluated every three years, is eligible for special education, and has been provided FAPE which has resulted in his making progress. Prior to completion of the reevaluation in 2005 the school system requested the parents permission to conduct cognitive ability testing and the permission was denied. The 2005 reevaluation was completed and an appropriate IEP was developed. It is agreed and established by evidence that the student needs special education and related services. The only question is whether the school system could provide the student more, or better, special education and related services if the IEP team additionally had cognitive ability testing information.

Because there are no I.Q. test results from the 1998 testing, and it is questionable as to whether valid testing could be performed, there may be concern

if any determination could be made as to whether the educational and related services the student has been receiving have improved or impaired his cognitive ability. An issue regarding I.Q. or cognitive testing is whether such testing would underestimate the progressive capabilities of the student and, if so, result in IEPs that did not permit him to make the progress, including academic progress, that he should be making as a special education student.

During testimony as to why the school system wanted, or needed, to conduct cognitive ability testing of this student, there was an issue raised as to whether all the reasons stated were relevant to this proceeding because the request for due process hearing alleged the testing was necessary for a reevaluation. The student's parents contend that a reevaluation was performed and the IEP was developed and that testing of cognitive ability was not requested or necessary for the IEP team meetings when continued eligibility for special education and the new IEP were determined. The school system asserted that such testing was necessary to make determination regarding state-mandated testing of students; however, it was established that such determination was made at the IEP team meetings which resulted in the 2005-2006 IEP. Also, it was agreed that no comment about I.Q. or cognitive testing at the IEP team meetings for the May 2005 three year reevaluation and development of the IEP for 2005-2006.

20 U.S.C.A. § 1414 begins with "(a) Evaluations, parental consent, and reevaluations" and provides at (a)(2) for "Reevaluations".

20 U.S.C.A. §1414 (a)(2)(A) provides that reevaluations are to be conducted

- (i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
- (ii) if the child's parents or teacher requests a reevaluation.

20 U.S.C.A. §1414 (a)(2)(B) provides limitations on reevaluations in that they "shall occur—

- (i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and
- (ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

20 U.S.C.A. §1414 (b)(3)(B) does provide as a requirement for conducting evaluations that “the child is assessed in all areas of suspected disability”.

However, 20 U.S.C.A. §1414 (c)(4) provides as follows:

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child’s educational needs, the local educational agency - -

(A) shall notify the child’s parents of –

- (i) that determination and the reasons for the determination; and
- (ii) the right of such parents to request assessment to determine whether the child continues to be a child with a disability and to determine the child’s educational needs; and

(B) shall not be required to conduct such an assessment unless requested by the child’s parents.

IDEA Regulation 34 C.F.R. 300.533 provides that determination of what additional data/information, if any, is needed for a reevaluation, after reviewing existing data, is to be made by the members of the IEP Team “and other qualified professionals, as appropriate”.

### FINDINGS AND CONCLUSIONS

1. The last formal assessment of the student’s cognitive ability, at least with regard to the school system, was conducted October 26, 1998 when the student was 7 years of age. The student was 15 years of age at the time of the Due Process Hearing. The school system has conducted numerous

evaluations/reevaluations and testings of the student and has never used I.Q. or cognitive testing, or results of such testing, for consideration by the IEP Team.

2. The student is eligible for and needs special education and related services.

3. The school system and IEP Team have provided the student free appropriate public education and he has continuously made progress.

4. The school system submitted a Reevaluation Team Recommendation Parental Consent form to the parents stating that on February 15, 2005, the Reevaluation Team reviewed the existing data and determined that more information was needed in seven specified areas and requested the parent to indicate whether the parent agreed or not. The mother signed the document on March 22, 2005 and indicated agreement with five of the specified areas and disagreement with the areas of "Cognitive Functioning" and "Adaptive Behavior" and handwrote a response on the document which included the statement to the effect that the school system could not proceed without consent unless and until it obtained a Due Process Hearing Order.

5. Following the parental denial of complete consent, the School system sent notices/invitations to the parents for the May 6 and May 13, 2005 IEP Team meetings to review reevaluation results and determine eligibility for special education and related services, and to review or develop an IEP. The meetings did result in determination of eligibility and development of an IEP which the IEP Team agreed included what best met the student's needs at the time.

6. Subsequently, in July, 2005, the school system filed the request for due process hearing which resulted in this proceeding.

7. A school system is to conduct a reevaluation at least every 3 years and to conduct a reevaluation if conditions warrant. The reevaluation was conducted in May 2005 and the testimony and exhibits presented at the hearing establish that it must have been determined that no additional data was needed to determine whether the this student continues to be a child with a disability and to determine the child's educational needs. There is evidence that at least some persons think that obtaining the additional data could possibly result in development of a more

appropriate IEP; however, everyone agrees that the IEP is appropriate and the student is being provided free appropriate public education by the special education and related services designed by the IEP Team to meet the student's individual needs.

## RELIEF

Because the request for due process hearing to order a re-evaluation with the school system permitted to perform cognitive testing which the parents had refused to agree to was submitted two months, and less than one year, after a reevaluation had been completed and the results of the reevaluation process and development are the IEP which provides the student with appropriate education and related services, a reevaluation is not ordered at this time. The process and development of an IEP for the 2006-2007 school year is unknown. If there comes a time before the scheduled 2008 three year reevaluation when the student's parents or teacher request a reevaluation, or it is determined that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation, then such reevaluation should occur. Whenever there is a reevaluation, if it is determined to be necessary or appropriate to revise the student's IEP, the IEP may then be revised subject to another due process hearing proceeding if any revision is made and not agreed to.

## ORDER

It is, hereby, ORDERED as follows:

1. The July 2005 due process hearing request for a re-evaluation of the student regarding cognitive performance and capability following the May 2005 completed reevaluation is denied.

Entered this \_\_\_\_ day of October, 2006.

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JACK E. SEAMAN (4058)  
ADMINISTRATIVE LAW JUDGE  
2021 Richard Jones Road, Suite 350  
Nashville, Tennessee 37215-2874  
615/383-3332

#### **NOTICE**

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County or in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing document has been sent by U.S. Mail to the following on this \_\_\_\_ day of October, 2006:

Wendy Tucker, Esq.  
1308 8<sup>th</sup> Avenue, North  
Nashville, TN 37208  
**Attorney for Parent(s)/Student)**

John Kitch, Esq.  
2300 Hillsboro Road  
Nashville, TN 37212  
**Attorney for School System**

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JACK E. SEAMAN

cc: Bill Wilson, Esq., Legal Consultant  
Tennessee Department of Education  
Division of Special Education  
5th Floor, Andrew Johnson Tower  
710 James Robertson Parkway  
Nashville, Tennessee 37243-0380



the student as eligible for special education as hearing impaired and developed an IEP which addressed issues and needs of the student, including many not related to hearing impairment. The May 2005 reevaluation was the 3 year reevaluation and the next reevaluation was scheduled for 2008. At the May 2005 reevaluation and IEP team meetings there was no mention of cognitive testing and all members of the IEP team agreed that the IEP best met the student's needs at that time. The testimony and exhibits presented at the hearing establish that it must have been determined that no additional data was needed to determine whether the this student continues to be a child with a disability and to determine the child's educational needs.

It is agreed and established by evidence that the student needs special education and related services. The school system has conducted numerous evaluations/reevaluations and testings of the 15 year old student beginning at age 3 and has never used I.Q. or cognitive testing, or results of such testing, for consideration by the IEP Team. There is evidence that at least some school system persons think that obtaining the additional data could possibly result in development of a more appropriate IEP; however, everyone agrees that the IEP is appropriate and the student is being provided free appropriate public education by the special education and related services designed by the IEP Team to meet the student's individual needs and is making progress.

Because the request for due process hearing to order a re-evaluation with the school system permitted to perform cognitive testing which the parents had refused to agree to was submitted two months, and less than one year, after a reevaluation had been completed and the results of the reevaluation process and development are the IEP which provides the student with appropriate education and related services, a reevaluation is not ordered at this time. If it is subsequently determined that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation, then such reevaluation should occur. The July 2005 due process hearing request for a re-evaluation of the student regarding cognitive performance and capability following the May 2005 completed reevaluation is denied.